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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 1304.

FORT PAYNE COAL AND IRON COMPANY

vs.

A. L. SAYLES AND OTHERS.

BRIEF FOR SAYLES AND OTHERS.

JAS. NORFLEET,
Solicitor for A. L. Sayles et al.

JUDD & DETWEILER, PRS., WASHINGTON, D. C.

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The order of the circuit court of Alabama from which appeal was taken to the United States circuit court of appeals was interlocutory.

That appeal was taken under section 7 of the act of March 3, 1891, establishing circuit courts of appeals.

The order reads as follows:

"It is further ordered and adjudged and the clerk will issue the proper order restraining the several defendants, A. B. Green, A. J. Butler, Citizens' Bank and Trust Company, G. N. Henson, their agents and attorneys, and all other creditors of the Fort Payne Coal and Iron Company, or other persons having possession of any of the bonds of said company or any of its property, assets, or effects from disposing of the same, said orders being returnable at Birmingham, Ala., on the first Monday in September, 1892, when cause may be shown why they should be dissolved or continued." (Record, p. 27.)

The temporary injunction was addressed to A. B. Green, A. J. Butler, the Citizens' Bank and Trust Company, and G. N. Henson, their agents and attorneys, and all other creditors of the Fort Payne Coal and Iron Company; and the record shows that it was served on A. J. Butler and A. B. Green, and those two only. (Record, pp. 27 and 28.)

The only order addressed to and served on the Fort Payne Coal and Iron Company was the order appointing a receiver (Record, p. 29). The record further shows (p. 41) that the injunction against Butler and Green and all others to whom it was addressed *by name* was dissolved; and that it was "continued as to all others;" so that there is no injunction against the Fort Payne Coal and Iron Company unless it be included in the language of the order, viz: "or other persons having possession of any of the bonds of said company or any of its property, assets, or effects." These words, it is contended, are too general and do not form a proper basis for appeal—constitute in fact no interlocutory order. No injunction was ever issued against the coal and iron company and none exists unless by implication under these general words.

If it be concluded that these general words are sufficient to establish, as existing, an injunction against the Coal and Iron Company, then it is contended that the case is not one proper for a writ of certiorari, because the order complained of is not a *final decree*. Section 6 of the act of March 3, 1891, recites "that the circuit courts of appeal established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error *final* decision in the district court and in the existing circuit courts," &c. Lower down in the same

section it is said: "And excepting also that in any such case as is hereinbefore made *final* in the circuit court of appeal it shall be competent for the Supreme Court to require," &c.

This order complained of is interlocutory and in no sense final, and the statute, of grace, in section 7 gives an appeal from it, and that right has been exercised. The remedy has been exhausted until *final* decree is made in the cause.

This construction must prevail and effect be given to the intent of Congress, viz., relief to the Supreme Court (McLish *vs.* Roff, 141 U. S., 666), or else it rests in the discretion of the Supreme Court whether every question decided in the circuit courts of appeals may not be brought before it on motion for certiorari.

The appeal was taken to the circuit court of appeals upon a question of jurisdiction; the order appealed from was interlocutory. The appeal on the question of jurisdiction from such order could not have been taken directly from the circuit court to the Supreme Court (McLish *vs.* Roff, 141 U. S., 666), and as it could not have been done directly it cannot be done indirectly through the Circuit Court of Appeals. Final judgment must first be had.

However, if it be held that it rests in the discretion of the court to cause any case to be certified, then the facts of this case do not present sufficient gravity for its exercise.

"Certiorari will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision."

Law Ow Bew *vs.* United States, 144 U. S., 58.

MERITS OF THE PETITION.

The petition is without merit. Jurisdiction was properly entertained. The Old Colony Trust Company was not a necessary party.

Inadvertently the name of the Old Colony Trust Company was mentioned in the bill, but it was not made a party either by process, voluntary appearance, or otherwise. It is a citizen of Massachusetts, of which State some of the plaintiffs are citizens and residents; and moreover it could not have *resided* in the district in which suit was brought.

So. Pacific Co. *vs.* Denton, 146 U. S., 202.

Hotel Company *vs.* Wade, 96 U. S., 13.

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JOHN A. W. SMITH,
Counsel for Petitioner.

PETITION.

The Honorable Melville W. Fuller, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The Fort Payne Coal and Iron Company, a corporation organized under the general laws of Alabama, respectfully shows—

1. That a bill in equity was filed in the United States circuit court for the southern division of the northern district of Alabama by A. L. Sayles and other individual stockholders and bondholders of petitioner corporation, some of whom are alleged in the amendment to the bill to be citizens of the State of Massachusetts, against petitioner, a citizen of Alabama, The Old Colony Trust Company, a corporation organized under the laws of Massachusetts and a citizen of that State, and others.

It is shown by the bill that petitioner made a deed to real estate to the Old Colony Trust Company, including a large portion of the property involved in this suit, *in trust*, to secure the bonded indebtedness of the petitioner corporation, amounting to three hundred thousand dollars. This trust deed was executed and accepted by the said trustee. A minority of the stockholders and of the bondholders are made parties plaintiff. Numerous other persons representing the majority of stocks and bonds are not made parties to the suit.

Under the terms of the deed in trust, which is attached to and made a part of the said bill, it is provided (Record, side pages 23, 24):

"1. Until default shall be made in the performance of the conditions of this instrument or in any of them the party

of the first part (petitioner) shall remain in possession and retain exclusive control of the mortgaged premises and every part thereof, and shall collect, take, and use the earnings, profits, income, and revenues, and dispose of the same and with the same effect as if this deed had not been made."

In the tenth clause of said deed it is further provided (Record, side page 28):

"The right of action under this indenture is vested exclusively in the trustee and under no circumstances shall a bondholder or any number of bondholders have a right to institute an action or other proceedings on or under this indenture for the purpose of enforcing any remedy herein and hereby provided, except in case of refusal on the part of the trustee to perform any duty imposed on it by this agreement, and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustee, according to its sound discretion, but the trustee shall be under no obligation to institute any such suit or to make any proceedings under this indenture until it shall be indemnified to its satisfaction for all expenses and costs of every kind, and also for all possible claims of damages."

The bill complains of alleged acts of waste on the part of the president and directors of the company, none of whom are made parties to the suit, and alleges that plaintiffs requested the Old Colony Trust Company to institute proceedings to prevent the alleged waste. The sixth clause in the trust deed provides the remedy in case of waste and is as follows (Record, side page 26):

"Sixth. In case the party of the first part shall fail to maintain and operate the property hereby conveyed and every part thereof in conformity to the requirements of this instrument and such failure shall continue for a period of sixty days after the receipt by the said party of the first part of a notice from the Old Colony Trust Company of Boston, Massachusetts, or from a majority of the holders of said bonds secured by this instrument and then outstanding, which latter notice shall be supported by affidavit that

the party of the first part has allowed and is continuing to allow unnecessary waste of the property secured by this instrument, then may the trustee, for and in behalf of the holders of said bonds secured by this instrument and then outstanding, take possession —— and make good the waste at the expense of the party of the first part," etc.

None of the bonded indebtedness was due at the time of the filing of the bill except some unpaid interest coupons, and the original parties plaintiff did not have as much as two thousand dollars unpaid interest coupons at the time of the filing of the bill, and no one of the plaintiffs brought in by amendment holds as much as two thousand dollars of past-due interest coupons. The interest coupons had not been past due for six months when the bill was filed so as to authorize the trustee to declare the bonds due and payable and to elect a foreclosure of the trust deed, as therein in the second clause provided. (Record, side page 24.)

The only allegation of waste in regard to any property covered by the said trust deed was an alleged sale of real estate for taxes on the 31st day of May, 1892, which under the laws of Alabama may be redeemed at any time within two years.

2. The bill shows numerous meetings of the board of directors and of the stockholders of petitioner corporation, but does not aver any effort on the part of any of the plaintiffs to get either body to redress, by suit or otherwise, the alleged wrongs complained.

3. The property involved in the said suit cost petitioner about two millions of dollars in cash and is worth now reasonably one million dollars. The present officers and directors of petitioner were elected on 23d of March, 1892 (Record, side page 42), and the said sale for taxes was for a default made prior to said date for the taxes of the preceding year. The bill does not show whether most of the

alleged acts complained of were committed by the present or former officers and directors of the petitioner.

4. The said bill complains of alleged acts of waste of the personal and real property of petitioner, and sought and obtained an injunction restraining petitioner and other defendants from disposing of any of the property of petitioner, and also sought and obtained the appointment of a receiver to take possession of *all* the property, real and personal, of petitioner. The bill alleges that petitioner is insolvent, and prays "that the property and assets of said corporation (petitioner) may be converted into money and the debts paid off, according to their respective rights, liens, priorities of creditors," and for general relief.

5. No other cause existed for invoking the jurisdiction of the Federal court except the difference of the citizenship of the parties, and jurisdiction was sustained in the said circuit court and in the United States circuit court of appeals for the fifth circuit, to which court petitioner prosecuted an appeal upon the ground that defendant The Old Colony Trust Company was not a material party to said cause.

6. The said bill was presented to Hon. John Bruce, district judge, and he, in vacation, granted a temporary injunction restraining petitioner from disposing of any of its property and appointed a temporary receiver to take possession of all the property, personal and real, of petitioner. A rule *nisi* (see Record, page 35) issued to appellant to show cause why the same should not be continued and made permanent. For answer to the rule, on September 5, 1892, in term time, various demurrers were interposed, among which were the following:

"The court is without jurisdiction of this cause—

"1. Because it was not shown that the parties plaintiff and defendant are citizens of different States.

"2. It is not shown that the amount involved in this suit is as much as two thousand dollars.

"5. The bill is without equity because plaintiffs have shown no capacity in themselves to maintain this suit, the injury, if any exists, being to the interest of the defendant Fort Payne Coal and Iron Company and not to the plaintiffs.

"6. The bill does not show that the creditors who join as plaintiffs have reduced their claims to judgment," etc.

(Other grounds of demurrer, see Record, side pages 38, 39.)

On the 12th day of September the plaintiffs amended their bill (see Record, side pages 42–48) and attempted to obviate the defects therein pointed out by the demurrers, but the amendment fails to cure the defects pointed out by the foregoing demurrers if well taken at the time of filing. It expressly alleges (side pages 44, 45) that some of the plaintiffs in the original bill are citizens of Massachusetts, and that the defendant The Old Colony Trust Company is a citizen of the same State. It fails to show that the amount of unpaid interest coupons due to all the plaintiffs in original bill exceeds two thousand dollars, or that their claims had been reduced to judgment, and it wholly fails to show a compliance by plaintiffs, who are stockholders, with rule 94, equity practice adopted by the Supreme Court, the objection for that reason being raised by demurrer No. 5. After the bill was amended as aforesaid the demurrers were refiled and then were overruled by the court. Said circuit court then made an order, judgment, or decree continuing the said temporary injunction and making the receivership permanent, and from the said order, judgment, or decree continuing said injunction petitioner appealed to the United States circuit court of appeals for the fifth circuit, and on, to wit, the 8th day of January, 1893, said appellate court rendered judgment affirming the decision of the said circuit court, said cause being numbered 85 and styled in said circuit

court of appeals "Fort Payne Coal and Iron Company, appellant, *vs.* A. L. Sayles *et al.*, appellees."

In the order of the said circuit court allowing the appeal the names of all the appellees do not appear, but the appeal was taken and allowed in open court and no citation issued, and James Norfleet, Esq., counsel who represented all the complainants in said cause in the court below, viz:

A. L. Sayles, R. P. Kingman, Henry A. Yeaton, Charles H. Garrett, John Conlon, Benjamin Kennard, A. E. Rand, Asa Walker, C. H. Snow, R. L. Snow, William Ward, F. R. Garrett, Asa A. Yeaton, S. Liebman, Winifred Yeaton, H. B. Pierce, Horace B. Parker, Charles A. Eaton, George Bilbrick, E. T. Bartram, L. A. McMurry, State Bank of Renwick, Iowa; Jacob M. Funk, Albert Culver, Charles A. Grant, A. C. Judkins, Richard Hodgson, Horace Low, E. J. Fletcher, Lucia A. Rand, Mrs. George S. Smith, S. B. Champlin, S. W. Shorey, Frank T. Dwinnell, George S. Smith, A. H. Sayles, Oliver Ames, Charles Russell, B. S. Buckinster, Richard Rich, Robert P. Gifford, Melvina Poor, J. S. Needham, Preston B. Keith, Andres Howes, J. A. Cross, H. C. Greeley, Mary E. Graves, H. P. Sanford, Geo. L. Haradin, Harold W. Stevens, Benjamin Brierly, N. C. King, Charles E. Kibbey, J. A. Wilder, Miles Smith, Andrew C. Cushing, William H. Anderson, Samuel Keith, A. E. Aldrich, Samuel Shorey, Jonas Reynolds, Ellen S. Reynolds, George W. Vickery, Jared A. Smith, H. T. and Sarah A. Marshall, Dexter Butterfield, B. F. Bartlett, Levi Cooley, Jr., W. G. Carthell, E. F. Merriam, Isaac Jay, W. A. C. Oaks, Zachariah Shattuck, Randall Richards, W. H. Burgess, Walter Steele, Esther S. Burns, William N. Scott, Annie V. Buffum, Henry B. Pierce, and R. G. Howland, appeared in said circuit court of appeals, and there was no motion to dismiss on account of a failure to give the names of all the appellees, and the said cause was submitted in said court of appeals on errors assigned in the record.

Petitioner is advised and believes that in the judgment of

said United States circuit court of appeals, as well as in the judgment of the said United States circuit court for the southern division of the northern district of Alabama, there is manifest error, viz:

1. Said circuit court erred in making the order, judgment, or decree continuing the injunction.

2. Said circuit court of appeals erred in its judgment affirming the said order, judgment, or decree of the said circuit court.

Wherefore petitioner prays that the Supreme Court of the United States, or some justice of said court as may be deemed proper, allow and cause to be issued to petitioner a writ of certiorari, writ of error, or other appropriate writ, whereby said cause may be brought up to said Supreme Court for its review and determination, and that the said judgment of the said circuit court and said circuit court of appeals be reversed and annulled, and that the proper order be entered in said Supreme Court for the final disposition of said cause.

Petitioner herewith submits a certified copy of the record of said cause upon which it was determined in said circuit court of appeals, which is hereby referred to and made a part of this application, together with briefs on behalf of petitioner.

There is also annexed hereto a certified copy of the opinion of the court of appeals.

JOHN A. W. SMITH,
Attorney for Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, NOVEMBER TERM, 1892.

FORT PAYNE COAL & IRON COMPANY, *Appellant*,
vs.
A. L. SAYLES *et al.*, *Appellees.*
} No. 85.

Appeal from the circuit court of the United States for the northern district of Alabama.

Before Pardee and McCormick, circuit judges, and Locke, district judge.

MCCORMICK, *Circuit Judge*, delivered the opinion of the court:

In this case we do not deem it necessary to discuss the various questions made on this appeal. A careful examination of the case satisfies us that as between the bondholders who joined in and seek relief by the bill and the Fort Payne Coal & Iron Company, appellant, the bill presents a case of which the circuit court had jurisdiction and such equities as warranted the court to intervene for the preservation of the trust property and grant preliminary relief by injunction as well as by the appointment of a receiver.

The order appealed from should be affirmed and the cost of appeal adjudged against the appellant.

And it is so ordered.

A true copy.

Attest: J. M. MCKEE, *Clerk.*

We hereby accept service by copy of the within petition and motion and notice that said motion will be made in the supreme court on the 13th day of March, 1893.

JAMES NORFLEET &
CHAS. TURNER,
Solicitors for Complainants and Appellees.

BIRMINGHAM, ALA., *February* 28, 1893.

904

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APPLICATION FOR CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, to Have the Case of

FORT PAYNE COAL & IRON COMPANY

vs.

A. L. SAYLES AND OTHERS,

Lately Pending in said Court of Appeals, Certified to the Supreme Court for its Review and Determination.

BRIEF OF J. A. W. SMITH,

Attorney for Applicant Fort Payne Coal & Iron Company.

ROBERTS & SON, PRINTERS, BIRMINGHAM.

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Attorney for Applicant Fort Payne Coal & Iron Company.

The facts are stated in the petition.

THE APPEAL.

The omission to name each of the appellees in the order allowing an appeal was never considered a sufficient reason for dismissing the appeal, when it was allowed *in open court*, as was the appeal in this case taken to the United States Circuit Court of Appeals for the Fifth Circuit.

Miltenberger vs. Logansport C. & S. R. Co., 106 U. S. 286.

An appeal may be amended under section 1005 Revised Statutes, and no motion having been made in the Court of Appeals, where counsel appeared for all the appellees, to dismiss, and the cause having been submitted and determined on errors assigned, all amendable defects should be treated, on this application to have the case reviewed in this Court, as amended.

The Inland Seaboard Coasting Co. vs. Tolson, 136 U. S. 532.

Chaffee vs. Hayward, 20 Howard, 208.

BRIEF.

I.

In the first place, we maintain, that inasmuch as several of the plaintiffs were citizens of the State of Massachusetts at the time the original bill was filed, and that the defendant, The Old Colony Trust Company, was a citizen of the same State, the United States Circuit Court had no jurisdiction to make an order continuing the injunction, or any other order except to dismiss the proceedings at the cost of plaintiffs.

Morris vs. Gilmer, 129 U. S. 315.

S. & W. V. R. C. Co. vs. Blatchford, 11 Wal. 172.

Mansfield C. & L. M. R. Co. vs. Swan, 111 U. S. 379.

It is claimed that The Old Colony Trust Company is only a nominal party to the suit, and for that reason it is contended that its being a citizen of the same State with the plaintiffs does not affect the jurisdiction of the Federal Court. As sustaining this view, appellees in the said Court of Appeals cited the case of Pacific Ry. Co. vs. Ketchum, 101 U. S. 289.

I insist that the case cited is not susceptible of any such construction. In that case, Ketchum, a citizen of New York, and a holder of bonds and unpaid interest coupons, filed a bill in the United States Court for the Eastern District of Missouri and alleged "that an application was made by your orator on behalf of himself and all other holders of bonds secured by said mortgage to defendants, Vail and Fish, to take proceed-

ings to foreclose the aforesaid mortgage," etc. Vail and Fish, the Trustees in that mortgsge, were made defendants and filed their answer admitting all the allegations of the bill, and which concluded as follows: "and these defendants as trustees of the several and varied interests of the bondholders secured by said deed of trust submit the same to the judgment of this honorable Court, that the same may be duly provided for and protected and ask that they may have such relief, including an allowance for costs and expenses herein, as to your honorable Court may seem meet."

A *consent* decree was rendered, foreclosing the defendant's right to redeem the property conveyed in the trust deed and decreeing a sale thereof at auction, subject to rights of prior mortgagees. Sale was made under the decree, and the property was purchased for the benefit of the bondholders. The Railway Company took an appeal. After disposing of the controversy as to the right of the Railway Company to appeal from a *consent* decree, the Court proceeded to determine the question of the jurisdiction of the lower court, which rested upon the diverse citizenship of the parties. The Court said: "For the purpose of this appeal, we need not inquire when the Circuit Court first got jurisdiction in this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause, to the right of the Court to proceed, and the decree, when rendered, was consented to, it was enough for the purpose of this appeal if the record shows that when the consent was acted on by the Court jurisdiction was complete." The court then adds that the trustees in the *earlier* mortgages were but nominal parties, because the bill sought a sale of the property *subject to their rights* under these earlier mortgages. If the holders of the bonds secured by the first and second mortgages had been parties, instead of their trustees, for the same reason, it would have been held that they were only nominal parties. Their rights, as well as the rights of their trustees, were fully recognized. It was nowhere held that Vail and Fish, who occupied the same relation to the bondholders in that case that The Old Colony Trust Company does in this, were nominal parties only. Vail and

Fish in that case united with the plaintiffs and joined in the prayer for relief, and hence they were treated as *plaintiffs*, not as nominal parties defendant. The Old Colony Trust Company had not joined the plaintiffs in this case in the prayer for relief up to the time of the allowance of the appeal, and it is a material party, and being a citizen of the same State with plaintiffs, the United States Circuit Court had no jurisdiction to make any order in the case. It has been held that the Trustee, in trusts of the kind shown by the bill in this case, is the only necessary party to represent the interest of the beneficiaries.

Richter vs. Jerome, 123 U. S. 233.
Kerrison vs. Stewart, 93 U. S. 155.

The opinion of the Court in the case of S. & W. V. R. Co. vs. Blatchford, 11 Wal. 172, settles the contention of appellees against them, and is strictly applicable to this case. That was a suit by a trustee, a citizen of same State with defendant, and jurisdiction was denied. After reviewing the cases where jurisdiction was sustained when the parties really interested in the suit were citizens of different States, notwithstanding the suit was brought in the name of a nominal plaintiff who was a citizen of the same State with the defendant, the Court, in that case, said:

"There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt vs. Bland*, prevent the institution or prosecution of the actions or exercise any control over them. The Justice of the Peace, in the one case, and the Governor, in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved.

"In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract, negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made. The right to use different remedies is expressly provided upon default in the pay-

ments stipulated, and the adoption of either rests at the option of plaintiffs."

There is nothing in cases relied on by appellees inconsistent with the case just cited.

The mortgage confers on the Trustees in this case the legal title to the trust property, with active duties to perform, and, as in the case 11 Wal. 172, "the right to use different remedies is expressly provided upon default" in the performance of any of the requirements of the trust deed, "and the adoption of either rests at the option of the (plaintiffs)" Trustee.

The Court having no jurisdiction at the commencement of the action, a change in the arrangement of the parties from the position of defendants to that of plaintiffs can not cure the defect, unless, as in case Pacific R. Co. vs. Ketchum, this is done by the *consent* of all the parties

Anderson vs. Watt, 138 U. S. 694.
Mansfield C. & L. R. Co. vs. Swann, *supra.*

The bill being indefinite and uncertain in the object sought by it, should be construed againt the pleader, and treated as a bill to accomplish what it in so many words prays, viz.: "that the property and assets of said corporation may be converted into money and the debts paid off, according to the respective rights, liens, priority of creditors," etc.; and with such object in view, it is difficult to understand upon what rule of practice The Old Colony Trust Company, holding as it does the legal title to the property with active duties to perform in regard thereto, could be dispensed with as a party.

II.

If The Old Colony Trust Company should be treated as a party plaintiff, joining with the other plaintiffs, then the bill would be without equity, because, the sixth clause in the deed of trust (Record, p. —) provides that "in case the party of the first part (petitioner) shall fail to maintain and operate the property hereby conveyed * * * , and such failure *shall continue for a period of sixty days after the receipt by the said party of the first part (petitioner) of a notice,*" etc., "that the

party of the first part is continuing to allow unnecessary waste of the property secured by this instrument, *then* may the trustee" take possession and repair the waste, etc. It is only *after* petitioner has had *sixty days' notice* of waste, that the Trustee is authorized to interfere. If special reasons exist why it would have been unsafe to have delayed so that notice could be given, those reasons should have been, but are not, shown by the bill. Not even *one* day's notice was given, although the bill shows numerous meetings of the directory of petitioner shortly prior to the filing of the bill.

The rights and remedies of all the parties are expressly stated in the sixth clause of the trust deed, in case the property is allowed to waste. These rights and remedies are ample to prevent waste (real estate only being covered by the trust deed), and, being created by the express contract of the parties, should not be ignored as is attempted in this case. The very object, no doubt, in view, when the instrument was prepared, was to save the trust property from being wrecked by a receivership on account of some fancied grievance, by a minority, or even a majority of the bondholders. Courts usually enforce the contracts of parties. In this case the effect of the injunction and the appointment of a receiver is to do what the parties contracted they would not do, viz.: disturb the petitioner in the enjoyment of its property before condition of the trust deed is broken on its part. The bondholders and Trustee have no special interest in the property of petitioner, other than that covered by the trust deed; yet the injunction and receivership extends to the whole, including real and personal property not included in said trust deed. The only waste alleged which affects the trust property was in allowing some real estate to be sold for taxes. The present board of directors were elected March 23, 1892, and the taxes were delinquent January 1st, 1892, and it is not shown that the present management has been possessed of any funds, but on the contrary, the bill shows that the Company had no money or credit at the time of the election of the present officers and directors of the Company, and shows further that a committee was appointed at a meeting of the stockholders of petitioner which committee was to meet in a few days after the filing of

the bill, to devise means of raising funds to meet the demands of the Company. Record, p. —. The present officers and directors of petitioner, taking charge on March 23, 1892, (see record, p. —) found the deplorable condition of affairs mentioned in the bill, and yet they are enjoined from disposing of any of the property of petitioner, to raise funds to meet delinquent taxes, or for any other purpose whatever. If the officers and directors had threatened any acts of waste, it would have been proper to have enjoined them. None of the officers or directors are parties to this suit, but petitioner is enjoined from disposing of any of its property, even should it desire to do so in order to repair the alleged waste of the former officers and directors of the Company, or for the purpose of raising funds to meet the accrued interest on its bonded debt.

III.

This proceeding is not one to foreclose the mortgage or trust deed, but the subject matter of the controversy is *unpaid interest coupons*, and plaintiffs in original bill did not have as much as two thousand dollars of them, which were due, in the aggregate, and hence, for this reason, the Court below was without jurisdiction.

Bruce vs. M. & K. Ry. Co., 117 U. S. 514.

No one of the plaintiffs in the bill as amended claims to have two thousand dollars of pastdue unpaid interest coupons, and their several claims cannot be united for the purpose of conferring jurisdiction on the Federal Court.

Seaver vs. Bigelow, 5 Wall. 268.
Schwed vs. Smith, 106 U. S. 188.
Fourth National Bank vs. Stout, 113 U. S. 684.
Gibson vs. Shufeldt, 122 U. S. 27.

IV.

The remaining contention arises by reason of the failure of plaintiffs who are stockholders to comply with rule 94, before filing their bill. This question is raised by fifth assignment of demurrer, also by other assignments.

See Hawes vs. Oakland, 104 U. S. 450.

Since the decision in Hawes vs. Oaklond the Supreme Court adopted rule 94, equity practice, which was construed in Foote vs. Cunard Mining Co., 17 Federal Reporter, 46. After referring to the decisions and setting out the rule, Judge McCrary concludes by saying that the rule *is imperative* that stockholders must ask the directors to correct any wrongs to the corporation before stockholders can file a bill for such purpose. The rule received a similar construction in the case of City of Quincy vs. Steel, 120 U. S. 241. In the latter case the directors were requested to bring the action and refused; no effort was made to get the stockholders, as a body, to sue, and the Court held that rule 94 had not been complied with, and that the bill should be dismissed.

In State Courts, where there are no rules of practice governing such cases, certain allegations in the bill will obviate the necessity of stockholders calling on directors to act before they can file a bill to enforce the rights of the corporation, but no allegation in a bill can annul a rule of practice adopted by the Court.

City of Quincy vs. Steel, *supra.*

If the Circuit Court had no jurisdiction of the cause, or if rule 94 has not been complied with, or if the bill is without equity, it was error to continue the injunction. Plaintiffs amended as far as the facts would authorize, so, if the objections to the bill are well taken, this Court should reverse the decrees of the Courts below, and render a decree dissolving the injunction and discharging the receiver, with instructions to the Circuit Court to dismiss the bill, with costs against the plaintiffs.

Mansfield C. & L. M. R. Co. vs. Swan, 111 U. S. 389.
City of Quincy vs. Steel, 120 U. S. 241.

Respectfully submitted.

J. A. W. SMITH,
Attorney for Petitioner.

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FILED
MAR 7 1895
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SUPREME COURT OF THE UNITED STATES.

THE GEORGIA INFIRMARY FOR THE RELIEF AND PROTECTION OF AGED AND AFFLICTED NEGROES,

Appellant,

against

HARRIET CAZENOVE JONES and FRANK CAZENOVE JONES, Administrators with the Will annexed of the Estate of Gazaway B. Lamar, deceased,

Respondents.

THE CITY COUNCIL OF AUGUSTA,

Appellant,

against

THE SAME.

POINTS FOR APPELLANTS.

JOHN W. WEED,
Of Counsel for Appellants,
62 & 64 William Street,
New York, N. Y.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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Respectfully submitted.

J. A. W. SMITH,
Attorney for Petitioner.

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MAR 7 1893
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SUPREME COURT OF THE UNITED STATES.

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Respondents.

THE CITY COUNCIL OF AUGUSTA,
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THE SAME.

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U. S. Supreme Court.

THE GEORGIA INFIRMARY FOR THE RELIEF AND PROTECTION OF AGED AND AFFLICTED NEGROES,
Complainant and Appellant,

AGAINST

HARRIET CASANOVE JONES and FRANK CASANOVE JONES, as Administrators, with the Will annexed, of Gazaway B. Lamar, deceased,
Defendants and Respondents.

Statement and Points for Appellant.

THE CITY COUNCIL OF AUGUSTA,
Complainant and Appellant,

AGAINST

THE SAME,
Defendant and Respondent.

STATEMENT.

These actions are brought to establish the rights of the complainants to share as legatees in the estate of Gazaway B. Lamar, deceased.

The complainant in the first above-entitled action is an old charitable corporation of the City of Savannah, in the State of Georgia, whose especial object has been,

as its name indicates, the care of unfortunates of the late slave population (R., p. 13).

The complainant in the second above-entitled action is a municipal corporation, but it appears in this action also in the guise of a charitable corporation, as the will in question charges it with the extension of relief to the same portion of the Southern population (R., p. 7).

Both complainants are made legatees by the same paragraph of the will (item 11), and their rights to share in the estate stand upon almost the same basis (R., p. 8).

On the 4th day of October, 1874, Mr. Lamar died at the City of New York, leaving a will, which was duly proved before the Surrogate of New York County on the 10th day of November, 1874, by which Gazaway De Rossett Lamar, his son, was appointed his executor, and leaving also an estate amounting to over $400,000 in cash or available securities (R., p. 15).

The following is a synopsis of the will:

Item 1 directs the payment of testator's debts (R., p. 4).

Item 2 directs "that" all the rest of my property of which I may die seized or possessed, or which I may hereafter acquire, excepting *only my cotton claims upon the Government of the United States*, shall be, as soon as practicable, divided in four equal parts (R., p. 4).

Items 3, 4, 5 and 6 direct that each of the four parts above referred to should go to his four children and their children (R.. p. 5).

Item 7 directs "my executors *to press my claims upon the Government of the United States for payment of the following cotton which are now before the Court of Claims and also before the Committee on Claims of the Congress of the United States;*" then follows a description of the various claims by the marks on the bales and the number in each lot (R., pp. 5, 6 and 7).

Item 7 in the latter portion and item 8 directs a set-

tlement of certain accounts of certain equitable interests which C. A. L. Lamar and W. W. Cheever had in the cotton claims held by the testator directing their equitable interests to be charged with amounts which were due from them to him for losses on transactions in guano (R., p. 7).

Item 9 directs the payment of a legacy to his nephew, G. B. Lamar (R., p. 7).

Item 10 directs " *That the amount collected on my account from said cotton claims shall be divided into four equal parts, if it be less than $200,000, and be distributed to my four children,* as per items 3, 4, 5 and 6 of this my will, upon the trusts and limitations specified in the same " (R., p. 7).

Item 11 directs : " I give and bequeath *next out of the* RESIDUE *of my cotton claims, when collected,* one hundred thousand dollars, if so much REMAIN, and, if not, then whatever *balance may remain, to be divided equally between* the Mayor and Aldermen of the City of Augusta and the Oglethorpe Association or Infirmary at Savannah, of which Mr. John Stoddard is now president, and Dr. William Duncan is secretary, to be devoted to establishing and sustaining one or more hospitals for colored persons in each of said cities, &c. (R., p. 8).

Items 12, 13 and 14 direct the payment of certain other legacies " to be paid next out of my cotton claims " (R., p. 8).

Item 15 gives all *the balance* of *my cotton claims,* and all the residue of my property, to his four children (R., p. 8).

Item 16 names the executors (R., p. 8).

The complainants' claims as legatees having been rejected, these actions were commenced against the executor, and after the joining of issue a statement of facts was agreed upon by the parties upon the basis of which their rights are to be determined (R., pp. 13, 14, 15, 16).

By this statement it appears that the testator's will was executed on the 28th day of September, 1872, about two years before his death (R., p. 13).

At the time of making his will his estate consisted of real and personal property, in possession, and of claims in process of collection against the United States Government and its officers for cotton seized during the war. His estate, real and personal, other than such cotton claims, amounted to about $61,000, while his cotton claims were for several hundred thousand dollars (R., p. 13). A detailed description of them is set forth by the testator in his will (R., pp. 6 and 7).

The estate of the testator, other than his cotton claims, remained unchanged down to the time of his death (R., p. 15), but between the time of making his will and the time of his death he succeeded in recovering judgment upon the greater part of his cotton claims, and in collecting a sum of money upon them, which after the payment of all the expenses of collection left him the net sum of $342,819.80 (R., p. 15).

The suit for the recovery of these claims was brought by the testator in his own name, and he was the owner of them. He had the legal title to them, and was the equitable owner also, as his claims against W. W. Cheever and C. A. L. Lamar, who had a right to an accounting in respect to a portion of them, exceeded any interest they had in the proceeds of the claims (R., pp. 13 and 14).

There was a portion of his claims, however, which the testator did not succeed in collecting, and which consequently he held in the shape of claims at the time of his death (R., p. 15). These have been unsuccessfully prosecuted, and are now barred by the Statute of Limitations (R., p. 16).

The money collected upon said cotton claims he invested in securities. These same securities he held down to the time of death, and they retained the exact

value he had given for them, to wit, $342,819.80 (R., p. 15).

Besides retaining the investment of these collections in unchanged form the testator applied $50,000, the amount of the legacy to the Georgia Infirmary, to the purchase of $60,000 of the bonds of the City of Savanah which he spoke of as the property of the Georgia Infirmary, and the interest upon which he paid over to it so long as he lived (R., p. 16). This was not done in the case of the City Council of Augusta, as the hospital which was the prerequisite of the gift was not established until after the testator's death (R., p. 8). Until his death the City of Augusta had no intimation of his intended bounty.

The identity of the complainants with legatees mentioned in item 11 is conceded (R., p. 13).

The suit was tried before the Hon. WILLIAM J. WALLACE, who dismissed the bill on the ground that the legacies had been adeemed by the collection of the claims by the testator in his life time. A copy of the opinion rendered by him on such dismissal is appended hereto.

Assignment of error
See point IX, page 20.

POINTS.

I. The collection of the claims by the testator did not adeem the legacies, but brought into existence the fund from which they were payable.

The testator nowhere in his will makes any gift of the claims themselves, but only a gift from *the amount collected* to his children, and from "*the residue of my cotton claims when collected $100,000, if so much remain*," to the complainants.

As soon as he received the money for his claims the fund came into existence which exactly answered the description of the gift, and had the testator retained this money intact and unchanged down to the day of his death there could not be a question but that such money constituted the precise subject of the gift, viz., the collections from the claims.

There is no word or phrase in the will which indicates that the collection must be made after the death of the testator. On the contrary, its whole context shows that he intended to give the collections from his claims whether such collections were made before or after his death.

The exclusion of his children from any share in the cotton claims under item "2," which the testator, in item 7, speaks of as "now before the Court of Claims, &c.," and his subsequent gift of the collections under item 10, shows that the *status* of his property, as it existed at the time of making the will, was intended as the basis upon which the beneficiaries under the will should share in his bounty.

The will speaks in regard to the disposition of the collections of the claims as of its date. Thus speaking, any collection made after its date became subject to items 10 and 11.

A will does not in all cases speak as of the time of the testator's death. The following are modifications of the general rule:

"A will speaks from the date of the testator's death, "and not from its date, *unless its language, by fair con-* "*struction, indicates the contrary intention.*"

Redfield on Wills, Vol. 1, p. 379.

"Whenever a testator refers to an actually existing "state of things, his language should be held as re- "ferring to the date of the will and not to his death."

The same, p. 380.

"The general rule does not apply when the date of

" the will, as opposed to the death, is distinctly re-
" ferred to."

Hawkins on Wills, p. 19.
See also 1 Roper on Legacies, 247.

A glance at the will shows that the testator looked upon his estate as consisting of two widely distinguishable parts, one of available property in possession, the other of property, cotton claims in suit, which might become available by collection. The one he disposes of by language of absolute gift, the other he disposes of by bequeathing the collections only as they come in. If his available estate was increased by the collections, then he made disposition of the increase. The collection, instead of destroying, became the condition of the gift.

The testator's situation was inconsistent with the existence of an intention on his part that the will should apply only to the collections made after his death. He was in the midst of a struggle for the establishment of his claims and bending every energy for their collection. It is not supposable that he chose language with the intention that the effort he was then making should destroy its effect.

Authorities applicable to the views above urged are the following:

Redfield on Wills, Vol. II., page 43, *et seq.*

The author, after referring to the case where a *chose in action* itself is bequeathed and subsequently paid in to the testator as one where no question remains that the legacy is adeemed, proceeds to say:

" SEC. 5. But a distinction is to be observed between
" the bequest of a thing in action as a particular security
" for money and a bequest of the money which may
" arise or be received upon such claim, since in the lat-
" ter case it is not inconsistent with the bequest that
" the testator should receive the money in his lifetime
" and reinvest it in another form."

Morgan vs. Thomas, Eng. Law R., 6 Chan. D., 176, 1876.

In this case the testator bequeathed all the estate to which he would be entitled under his uncle's will, and then during his life collected the amount of his claims, £800, which he invested in £600 of the stock of the B. & E. R. R.

It was held that the legatee was entitled to the £600 stock of the B. & E. R. R.

The Court said : "If I put the * * * construc-
" tion on the words so as to make them apply to per-
" sonal estate derived from the will of the uncle in
" whatever form it may be found at the death of the
" testator, provided only that it be distinguishable from
" the rest of his estate, I adopt a construction which I
" think will more probably give effect to the intention
" of the testator as expressed in his will. The only
" remaining question is whether the legacy is capable
" of being followed."

Clark vs. Brown, 2 Small & Gifford R., 524.

In that case the testator bequeathed to each of three legatees " one-third of the amount of whatever sum of " money may be received from my claim on the estate " of the late Sir Charles Booth." Two of the thirds were given to his children, absolutely, and the other third to his wife, for life, with remainder to his children. His wife was also his residuary legatee. During his life there was paid to the testator £11,000 on account of his claim, the balance of £800 was paid after his death. The £11,000 he invested in a lot of securities, which he retained to his death. His wife survived him. The plaintiff claimed in right of the wife that only £800 collected after death was the subject of the bequests to the three children, and that the collections made prior to the testator's death became a part of the general estate, which passed to her as the residuary legatee.

The Vice-Chancellor said : " If the sums received by
" the testator under the order of the Court had been
" mixed with the general mass of his property, there

" would have been more room for this argument in " favor of destruction and ademption, but, so far from " thus mixing the amount received, he invested that " amount as a separate fund in 3 per cent. stock." * * *

" *The benefit intended for the legatee was, according to* " *his language, the amount which might be received in* " *respect of his claim.*" * * * "The principle of " the civil law, to which Sir JOHN LEACH alludes in " *Baker vs. Raynor*, has regard to the act of the testator " in dealing with a specific subject, so as to preserve it " for the legatees. That principle seems to me still " more strongly to apply to this case, for there is little " doubt as to what was the meaning of the testator as " to the fund in the State in which it stood at the time " of his death." * * *

" The fair construction of the testator's language " makes it not a gift of the debt *quâ* debt, but of the " sum of money produced when the debt was recovered " and ceased to exist as a debt. This goes to show " that *the testator contemplated the recovery of the debt* " *in his own lifetime, when the subject of the gift could* " *not be the debt itself, but the amount recovered in re-* " *spect to it.*"

Nool vs. Vannoy, 6 Jones Eq., 135.

In that case the words " proceeds of sale " were held to pass the subsequent investment of the proceeds. The Chancellor there says: " The distinction between a gift of the property itself and a gift of the value of the property or the proceeds of the sale of the property is well settled," and quotes with approval from " Roper on Legacies: " " The last " class of cases to be noticed as not falling within the " general rule of ademption is where the terms of the " bequest are so comprehensive as to include within their " compass the fund specifically bequeathed, although it " has undergone considerable alteration."

Doughty vs. Stillwell, 1 Bradford R., 300.

In that case the testator bequeathed several amounts which he directed should be collected from a certain bond and mortgage of the Methodist Society of the City of New York. After the execution of the will the testator surrendered to the Methodist Society their bond and mortgage upon receiving in exchange the assignment of another bond and mortgage of the same amount from the Emanuel Congregation.

There the Surrogate said (see p. 306 *et seq.*):

" But there seems to me to be other and sufficient " ground to support the claim of the legatees. Whether " a legacy was adeemed or not depended in the civil " law on the intention of the testator " *(Swinborne, Pt.* 7, § 20*)*.

" I do not propose to examine this proposition fur- " ther than to advert to a class of cases which show " that even a specific legacy is not always destroyed by " the change of form in its substance; that the dry, " abstract doctrine of a change in the form effecting an " extinction of the gift is measurably subject to the " question of intention, and the Court will therefore " look into the circumstances attending the change, " and sometimes follow the substance, the gift still at- " taching in its new shape.

" In the civil law, even where there was a specific " bequest of a fund, at the time invested in a particular " way, and it was called in, but the testator ' laid it up " ' and safely kept it for the legatory,' the gift was not " revoked " *(Swinborne Pt.* 7, § 20*)*.

He then proceeds to review a long list of cases in which this principle is sustained and says:

" The principle of these decisions seems to be that " if the fund, instead of being destroyed, remain in the " same in substance, with unimportant alterations, " such slight variations will not adeem the bequest."

" Had the legacy, in its phraseology, been limited to " the bond, the security itself, the case would have been " more doubtful, *but he gives the amount*, and the

" *amount, when collected*, thus affording room, without " any great strain, to regard the substituted security as " the proceeds or representative of the first bond, and " to look upon the proceeds of the new security, when " realized by the executor, as in substance the very " amount given by the testator when collected."

II. The legacies were not adeemed by putting the collections into investment securities.

The testator held all of the securities in which he invested the collections down to the time of his death without any change.

The terms "amount collected" "or residue when collected" do not mean the actual coin or treasury note received from the U. S. Treasury in payment of the claims, but only the distinguishable portion of the testator's estate upon which the Court can place its finger and say with certainty that it was the collection from the claim. Under a different rule a deposit of moneys in bank would work an ademption. The statement of such a proposition brings its own confutation. The receipt of an obligation of a bank of deposit does not, however, differ in principle from the investment of money in any other security.

Applicable to this proposition is the special provision of the New York statute, and the following authorities.

SEC. 47. A conveyance, settlement, deed or other act of a testator by which his estate or interest in property previously devised or bequeathed by him shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee the actual estate or interest of the

testator which would otherwise descend to his heirs or pass to his next of kin.

3 Rev. Stats., Banks' 7th Ed., 2887, side paging 65.

Burnham vs. Comfort, 108 N. Y., 539:

GRAY, J., there says:

"Ademption is the extinction or satisfaction of "a legacy by some act of the testator which is "equivalent to a revocation of the bequest, or indi- "cates the intention to revoke. * * * The ques- "tion of its (the rule's) application is made to depend "upon the declared or presumed intention of the "donor."

Doughty vs. Stillwell, *ubi supra.*

Gardner vs. Printup, 2 Barb., 83:

There a legacy of "the proceeds of a bond and mortgage" was held, although a specific legacy not adeemed as to that part of the testator's estate which could be distinguished as resulting from the bond and mortgage, but was adeemed as to that portion which he had used in paying debts, and for such general purposes.

The Court also held that evidence to show the testator's intention upon the subject of ademption was proper.

See also,

Lily vs. Curry, 6 Bush,593:

"If a specific legacy be alienated by the testator before his death the law presumes an intention to adeem it, and will be considered as adeemed "*unless there be circumstances to repel this legal presumption.*"

Whele vs. Winchester, 6 Peck, 56:

"The alienation of a specific legacy is presumptive proof of an intention to adeem. *It is for the plaintiff to show circumstances sufficient to repel this legal presumption.*

It would, indeed, be no stretch of the testator's language to regard the investments as the "amount collected," as securities in which moneys are invested will pass as moneys.

Townley vs. Townley, 53 L. J. R., Ch. Div., 516.

In that case the testatrix gave "all my moneys" to certain legatees, and her furniture to certain other legatees; a portion of her estate consisted of Chilian bonds.

PEARSON, J., said: "I come to the conclusion that "the word 'moneys' means here that description of "property which, in ordinary parlance, would be taken "to be 'moneys' in the larger sense—that is to say, "not only hard cash, but also investments."

"A lady is dividing her property into two parts, one "part consisting of her furniture, and the other of all "her money, a fact which has given rise to the infer-"ence to which I have alluded."

The analogy between the case last cited and the one at bar is marked. There was the evident division of the estate into two funds, and the word "moneys" used to indicate one fund just as "amount collected, &c.," is used by the testator here to cover one of the funds, and as "moneys" included investment of money, so should "amount collected" include the investments into which it was put.

III. The retention of the collections in investments easily distinguishable from the remainder of his estate and the payment of income of the investment of 50,000 to the Georgia Infirmary show the testator's intention that there should be no ademption.

The testator in nowise mingled the collections or their investments with the rest of his estate. He did not use it for the payment of debts. He preserved the investment intact to the time of his death. This alone would be sufficient to indicate an intention not to work an ademption, but this intention is emphasized in the case of the Georgia Infirmary. In its case he not only did not mingle the $50,000 he intended to give it with the rest of his estate, but he entirely separated its investment in bonds of the City of Savannah from all the other investments, deposited them with a Mr. Cunningham, and in his letter to him directed him "to hold "$60,000 of Savannah City bonds as the property of "the Infirmary, but under my control until I can ar- "range conditions with the president and managers."

There could hardly be a stronger indication that the testator did not intend there should be an ademption. The conditions he refers to as desiring to have made were doubtless those mentioned in his will, viz., that a preference should be shown to those who had been in his employ. His letters show, it is true, besides a setting apart of a portion of the collections for the infirmary, a desire to anticipate the operation of his will. Presumably, had he completed his arrangements to anticipate it he would have revoked the provision in favor of the infirmary, but with such conditions unarranged he was willing that the gift under the will with the conditions there expressed should take effect.

See cases cited under Point I.

IV. The testator's intention should control, even though his gift may not be readily brought within the usual classes of legacies.

It is contended that the legacy is not a specific one because it is not the gift of the claims themselves, but

is a gift of money. It is conceded that it is neither a general nor a demonstrative legacy because it is not payable unless the cotton claims were collected, but we do not understand that the law of testamentary bounty has been so restricted that a legacy to take effect must fall within one of these three classes; on the contrary, the preponderating rule still prevails that the intention of the testator is the polar star by which courts must be guided.

Tolar vs. Tolar, 14 Am. Dec., 576.

The Courts frequently recognize the fact that the manifest intention of the testator will shift a legacy from a class to which its language would seem to make it belong to another more conformable to his intention.

Pierrepont vs. Edwards, 25 N. Y., 128.

The language of the will seemed to indicate a specific legacy, and the Court construed it to be a demonstrative legacy, using the following language:

"that no positive rule of ready application to every "case can be laid down, but that each case will depend "upon a consideration of all the material provisions of "the will to be construed, and of the extrinsic circum-"stances respecting the testator's family and estate, "which may be fairly brought to bear upon the ques-"tion of intent."

It has been said, "as is indicated by the significant "name given to instruments of this nature, it is the "'will' of the testator which must govern * * *

Wager vs. Wager, 96 N. Y., 164:

There it was said that, "while it is not competent "for the Court to frame a will for the testator or im-"port new provisions into it for the purpose of carrying "out a supposed intent, yet it has been uniformly held "to be their duty to give such a construction to the "provisions made, especially if they are couched in in-"exact and ambiguous phraseology, as will effectuate "the general intent of a testator, as derived from an "examination of the whole instrument."

Phillips vs. Davies, 92 N. Y., 530:

There it was said: "If such was the real meaning and "intention of the testatrix, * * * if its plain and "definite purposes are endangered by maps and inaccu- "rate modes of expression, and we are sure that we "know what the testator meant, we have a right and it "is our duty to subordinate its language to the inten- "tion."

If some name for a class of legacies such as this must be found in order that the legacy can take effect, we would respectfully suggest the name of a conditional demonstrative or pecuniary legacy; that is to say, a legacy of money payable in the event that testator's estate is increased by the collection of a fund unavailable at the date of the will.

It was a long time before what is known as a demonstrative legacy established itself in the English common law. Many a demonstrative legacy was held to be adeemed as a specific legacy because it would not answer the description of a general legacy. But now since its establishment a fund may be referred to out of which a legacy is payable, and yet still be payable although the fund has failed.

The legacy in the case at bar is a legacy of money, which is the primary characteristic of a demonstrative legacy, and thus comes near to being a demonstrative legacy, but the fact that the testator did not intend that it should be payable unless his cotton claims were recovered, takes it out of the class of demonstrative legacies, because they are payable unconditionally. It would do no violence to reason nor, that we can see, to any salutary rule of law that a testator should be permitted to demonstrate a fund out of which a legacy shall be payable upon the condition that the fund shall arise either before or after his death.

This, we contend, was the testator's intention, as shown by himself bringing suit upon the claims, by the language he used in the will, and by his holding the

collections intact, and completely separable from the remainder of his estate.

V. The collections were all made on the testator's account, and consequently pass to the complainants.

The statement of facts shows that the testator had acquired the legal title to all the claims, and that the condition of the accounts of other persons having some equitable interests therein was such that, at the time of the making of the will, the testator, as he well knew, was entitled to retain, for his own account, the entire collections from his claims. Having both the legal and equitable title to the collections, the presumption must be that he intended the complainants to share in the entire collections.

It would be a narrow construction of the testator's language to exclude from his gift the collections from those claims in respect to which other persons might have had an interest if they had not been indebted to the testator.

The items 10 and 11 clearly refer to the same fund as 11 refers to the *residue* of the fund mentioned in item 10. In item 10 the whole amount of the collections is mentioned without the use of the phrase "on myaccount" used in 11, and the use of this phrase was not therefore intended to create any different fund from that referred to in item 10.

Both Webster and Worcester define "account" as "profit," "advantage," and this definition, as well as the manifest intent of the testator, subject all the collections from the claims which he could hold of right to the payment of the complainants' legacies.

VI. The learned trial Judge correctly stated the law of the case, but erred in applying it.

The learned Judge, commenting on the general rule of construction, that a will speaks as of the date of the testator's death, said, in its application to the case at bar,

"It does not seem to be a reasonable one."

This accords with the complainant's contention that the "collections" the testator intended were "collections" after the date of the will, and not alone "collections" after the date of his death.

The learned Judge also seems to lay down, as unquestioned, a principle of construction which sustained the complainant's contention.

"So far as the authorities which are cited for the complainants declare that bequests by which the *collections* or proceeds or the *amount to be received* from a particular claim or fund are given to legatees are not defeated, when the proceeds are received by the testator in his lifetime, and have been kept by him so as to be distinguishable from the rest of his estate, they are acceded to as undoubtedly correct. They proceed upon the distinction between the gift of a debt, *qua* debt, and the gift of a sum of money to arise when the debt shall have been recovered and ceased to exist as a debt."

Notwithstanding the above correct statement of the law applicable to this case, the learned Judge reached the conclusion that the legacies to the complainants were specific gifts of the claims themselves, although the testator made no gift of them to the complainants.

The method in which he reaches this conclusion is shown by the following. He says:

"The will in effect gives the cotton claims to the executors in trust to collect them, appropriate the proceeds to a distinct fund, and apply $200,000 of the fund pursuant to the directions of clauses 3, 4, 5 and and 6, the residue, if any, to the complainants and other legatees."

It can well be seen that the learned Judge could withdraw this case from his statement of the law contained in the next to the last quotation from his opinion only by finding somewhere a gift of the claims *qua* claims. He finds such a gift to have been made to the executors in trust.

It is respectfully submitted that neither does the will contain any language importing a gift in trust nor does its context imply an intention to make any such gift to them.

The only phrase from which the learned Judge appears to derive such an intention is the direction in item 7 to the executors "to press my claims."

This direction called upon the executors to perform merely a duty which the law imposed upon them, and assuredly can no more make a gift or create a trust than does the requirement of the law itself have such effect.

VII. The cases cited by the learned trial Judge and by the defendants are not applicable to the case at bar.

Most of the cases cited to sustain the decree are cases where either the *chose in action* or some portion of it, as distinguished from the proceeds of it, is given by the will. In the one the learned Judge especially relies upon, viz., *Davis vs. Crandall, 101 N. Y., 311,* the language expressly states that the money given is "*a portion of the debt*," &c.

VIII. Any doubt in regard to the construction of the will should be resolved in favor of the complainants.

The real suitors before the Court are the aged and

afflicted late slaves of the Cities of Savannah and Augusta, especially those who had been the testator's slaves, and his bounty to them would come only after ample provision had been accorded to his own family.

IX. Assignment of error.

The decree dismissing the bill of complaint should be reversed as erroneously made, in that:

1. The decree should not have dismissed the bill of complaint.

2. The decree should have adjudged that the complainants were entitled to a share in the assets left by the testator, which were in part the investment of sums received by him upon his cotton claims against the United States Government.

3. The decree should have ordered the executors to account to the complainants for the assets of the estate of the deceased, in which the complainants were entitled to share.

4. The decree should have directed the executors to pay to the complainants such sum as upon such accounting should appear to be due to the complainants out of the assets of the estate of the deceased.

JOHN W. WEED,
Of Counsel for Complainants.

GEORGIA INFIRMARY FOR THE RELIEF AND PROTECTION OF AGED AND AFFLICTED NEGROES vs. JONES ET AL.

CITY COUNCIL OF AUGUSTA vs. SAME.

(*Circuit Court, S. D. New York.* February 22, 1889.)

[Reported in 37 Federal Reporter, 750.]

In equity. Bills for legacies.

Bills respectively by the Georgia Infirmary for the Relief and Protection of Aged and Afflicted Negroes and the city council of Augusta, against Jones and another, administrators *c. t. a.* of Gazaway B. Lamar, for the payment of certain legacies given to complainant.

JOHN W. WEED, for complainants.

CHAS. C. BEAMAN, for defendants.

WALLACE, J.:

These actions involve the rights of the complainants, respectively, to legacies of $50,000, bequeathed to them for charitable objects by the will of Gazaway B. Lamar, deceased. The will was executed September 28, 1872, and at that time the testator owned real and personal property in possession, and had besides certain claims for a large amount against the Government of the United States for cotton which had been seized and sold by its officers during the War of the Rebellion, which claims were then being prosecuted for collection. The will, by the first clause, directs that all the debts of the testator be paid by the executors. By the second clause the executors are directed to divide into four equal parts "all the rest of my property of which I may die seized or possessed (or which I may hereafter acquire), excepting only my cotton claims upon the Government of the United States." The will

then provides, by clauses 3, 4, 5 and 6, for the distribution of the four parts by the executors of the property of the second clause, one to each of the four children of the testator, according to specified trusts and conditions. The seventh clause directs the executors "to press my claims upon the Government of the United States for payment for cotton, which are now before the Court of Claims, or before the Committee on Claims of the Congress of the United States," and enumerates the particulars of the several claims. By clauses 8 and 9 the will makes provision for the payment to certain persons of specified sums to which they are legally or equitably entitled from the proceeds of the cotton claims. The tenth clause directs the executors to divide the "amount collected" from the said cotton claims into four equal parts, if it be less than $200,000, and distribute it to the four children of the testator pursuant to the provisions of clauses 3, 4, 5 and 6. The eleventh clause bequeaths to the present complainants, "next out of the residue of my cotton claims when collected, $100,000, if so much may remain, and, if not, whatever balance may remain, to be divided equally," for the charitable objects particularly specified. Clauses 12, 13 and 14 bequeath certain other legacies out of the residue of the proceeds of the cotton claims. The fifteenth clause devises and bequeaths all the rest and residue of the testator's property, "real, personal and mixed," to the four children of the testator. The testator died in October, 1874. The will was probated in New York City, the testator's place of domicile. After making the will, the testator collected from the Government of the United States $342,819 on account of his cotton claims, and invested the proceeds in various securities. The cotton claims not collected during his lifetime are of inconsiderable value, and the executors have been unsuccessful in their efforts to collect them.

Applying the familiar rule that a will speaks as of

the time of the death of the testator, and not as of the time of its date, the second clause of the present instrument could be interpreted to mean that all the property which might belong to the testator at the time of his death, excepting only such cotton claims as he should then have, is to be divided by the executors into four parts, to be distributed for the benefit of his children. Consequently, in the absence of any other language or provision in the will to limit or control the meaning of the clause, according to this canon of interpretation, the provision would require the executors to include in the property to be distributed to the testator's children all the property and assets belonging to him at the time of his death, excepting such only as might exist in the form of outstanding and uncollected demands against the Government of the United States. This view would be fatal to the claims of the complainants; but it does not seem to be the reasonable one. It seems very plain that when by that clause the testator directed his executors to divide for the benefit of his children all the property of which he might die possessed, excepting only his cotton claims against the Government of the United States, he intended to exclude from the property thus to be divided the outstanding demands, which he particularly enumerated in clause 7 of the will. When he used the words, "my cotton claims," he referred to the uncollected debts, from which he thought enough might be realized to create a further fund of $200,000 for his children and $100,000 for the complainants. These particular claims which he enumerated and described, and which he directed his executors to press and collect, were the property which he had in mind, and which he intended to except from the operation of the second clause. In this sense, the will speaks as of the time of its execution, and the seventh clause is to be read as a gift of the cotton claims belonging to the testator at that date for the benefit of the children and the complainants together.

According to this interpretation, however, the legacies to the complainants are specific legacies, and the case falls within the rule that, where the subject of the bequest has ceased to exist before the testator's death, the legacy is adeemed. A specific legacy is one which is to be paid only out of a particular source or fund designated by the will. The extinction of the subject of a specific legacy, or such a change in its state as makes it another thing, annuls the bequest, for reasons paramount to considerations of intention. An example of the class, and an illustration of the rule, is found in the recent case of *Davis vs. Crandall*, 101 N. Y., 311, 4 N. E. Rep., 721. The will in that case bequeathed to the legatee "the sum of $243.92, a portion of the debt due me from James Davis, secured by his note." The Court held that this was a specific legacy and said: "If that note had been paid during the lifetime of the testatrix, or otherwise canceled or destroyed, so that no obligation at her death rested upon James Davis to pay it, the legatee would have taken nothing." This authority is in harmony with many decisions to the effect that if the bequest be of the sum owing upon a security or obligation, or of a sum to be paid out of a designated and distinct part of the testator's property, the legacy is specific (*Sidebotham vs. Watson*, 11 Hare, 170; *Chaworth vs. Beech*, 4 Ves., 555; *Ford vs. Fleming*, 1 Eq. Cas. Abr., 302; *Fryer vs. Morris*, 9 Ves., 360; *Towle vs. Swazey*, 106 Mass., 100). In *Gilbreath vs. Winter*, 10 Ohio, 64, the bequest was: "All the amount of moneys and interest that may be recovered of and from K. for the sums due me on the purchase of the [described] estate, to her and to her assigns." The bequest was held to be a specific one, and the receipt of the money by the testator to be an ademption of it. Because of the hardship of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator, or is extinguished in his lifetime, notwithstanding the will may denote unmistakably that the

testator intended to treat the legatee as an object of his bounty, the courts incline to consider legacies as demonstrative, rather than specific, where the language of the will is reasonably capable of that construction. Accordingly, if the bequest, instead of being for a specified sum "due upon" a security or obligation, is for the sum "out of the proceeds," or "contained in" a security or obligation, it will be treated as a demonstrative legacy, to which the rule of ademption does not apply. And whenever it can be inferred from the language of the will that the testator's intention was to give the legatee a specified sum, not necessarily out of a particular fund, although incidentally and primarily so, but irrespective of it, the gift will be construed as a demonstrative, instead of a specific, legacy (*Le Grice vs. Finch*, 3 Mer., 50; *Giddings vs. Seward*, 16 N. Y., 365; *Newton vs. Stanley*, 28 N. Y., 61; *Clarke vs. Browne*, 2 Smale & G., 524). A case in which the distinction between a specific and a general legacy in the same will is taken upon these principles, is *Gillaume vs. Adderley*, 15 Ves., 384. In determining whether the legacy is specific or demonstrative the question always is whether it is a gift out of a specified fund or security, or a gift of a specified sum, with a specified fund as security. If it falls within the former class, the legacy fails when the fund or security ceases to exist in the testator's lifetime. The law is well stated in *Walls vs. Stewart*, 16 Pa. St., 281.

"The distinction seems to be this: If a legacy be given with reference to a particular fund only, as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed, though the fund totally fails. But when the gift is of a fund itself, in whole or in part, or is so charged upon the object made subject to it as to show an intent to burden that object alone with its payment, it is specific."

Upon the authorities, it is entirely clear that the legacies to the complainants do not fall within the class

of demonstrative legacies. They are legacies of $50,000, payable exclusively out of the amount to be collected from the cotton claims by the executors; they are a gift out of a specified fund, and not otherwise. The will, in effect, gives the cotton claims to the executors, in trust to collect them, appropriate the proceeds to a distinct fund, and apply $200,000 of the fund pursuant to the directions of clauses 3, 4, 5 and 6, and the residue, if any, to the complainants and other legatees. The bequest cannot take effect except as to the claims which were not collected before the testator's death, because there was such a change in the subject matter as to annul the gift to the executors in trust. As to the collected claims, there was nothing in existence in respect to which the trusts imposed by the will upon the executors could attach. The case is directly met by the observations of Lord THURLOW in *Humphreys vs. Humphreys*, 2 Cox, 185, that:

"The only rule to be adhered to is to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death; for, if it did not, then there must be an end to the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case in destroying the subject of the bequest would be productive of endless uncertainty and confusion."

So far as the authorities which are cited for the complainants declare that bequests by which the collections or proceeds, or the amount to be received from a particular claim or fund, are given to legatees, are not defeated when the proceeds are received by the testator in his lifetime, and have been kept by him so as to be distinguishable from the rest of his estate, they are acceded to as undoubtedly correct. They proceed upon the distinction between the gift of a debt *qua* debt, and the gift of a sum of money to arise when the debt shall have been recovered and ceased to exist as a debt. In a gift of the latter class it may be inferred

that the testator contemplated the recovery of the debt in his own lifetime, and intended to give, not the debt itself, but the amount to be received in respect of it. When the bequests are of this character, the fund received by the testator in his lifetime may be followed through its transmutations, and reached, if capable of identification. The case of *Doughty vs. Stillwell*, 1 Bradf. (Sur.) 300, is a departure from the doctrine of these authorities, and, so far as it sanctions the proposition that the ademption of a specific legacy caused by the act of the testator in extinguishing the subject may be nullified by extrinsic evidence of his motive or intentions, it is not approved. The bequests here are for the sums given to the complainants, respectively, in case the executors should realize the amount by collecting the cotton claims, and not otherwise. The testator, by collecting the claims himself, put it out of the power of the executors to comply with the provisions of the will, and to that extent his acts were equivalent to a revocation of the bequests. The bill is dismissed.